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In The

Supreme Court of the United States

October Term, 1994

NORTH STAR STEEL COMPANY,

Petitioner,

v.

CHARLES A. THOMAS, *et al.*,

Respondents.

CROWN CORK & SEAL CO., INC.

Petitioner,

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

Whether, in actions brought under the federal Worker Adjustment and Retraining Notification Act ("WARN"), the applicable limitations period should be drawn from § 10(b) of the National Labor Relations Act ("NLRA") rather than state law.

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the largest federation of business companies and associations in the world. With substantial membership in each of the 50 states, the Chamber represents approximately 215,000 businesses and organizations and serves as the principal voice of the American business community. A significant aspect of the Chamber's activities is the representation of the interests of its member-employers in employment and labor relations matters before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. The Chamber has sought to advance the interests of its members by filing *amicus curiae* briefs in a wide spectrum of labor relations litigation before this Court.[2]

The National Association of Manufacturers of the United States of America ("the NAM") is a voluntary business association of over 13,000 companies, employing eighty-five percent of all manufacturing workers and producing over eighty percent of the nation's manufactured goods. The NAM is affiliated with 158,000 additional businesses through its Associations Council and the National Industrial Council. The NAM and these councils

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[1] This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 37.3. Letters of consent are being filed simultaneously with the Clerk of the Court.

[2] *See, e.g., McKennon v. Nashville Banner*, ___ U.S. ___, 63 U.S.L.W. 4104 (1995); *ABF Freight Systems, Inc. v. NLRB*, ___ U.S. ___, 114 S. Ct. 835 (1994); *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991).

provide information and other educational services and publications to employers regarding employer-employee relations and the laws and legislative proposals that pertain to them. Like the Chamber, the NAM actively represents the interests of its member-employers in a wide variety of labor and employment matters before the courts.[3]

These consolidated cases address the question of whether the statute of limitations for violations of the Worker Adjustment and Retraining Notification Act ("WARN") should be borrowed from state law or from § 10(b) of the National Labor Relations Act (the "Act" or the "NLRA"). This issue is of particular concern to Chamber and NAM members who are subject to WARN's procedures during a plant closing or layoff. On behalf of its members, the Chamber filed *amicus curiae* briefs before the U.S. Court of Appeals for the Third Circuit in these cases. Additionally, the Chamber filed briefs before the U.S. Court of Appeals for the Fifth and Sixth Circuits in cases addressing precisely this same issue. *Halkias v. General Dynamics Corp.*, 31 F.3d 224 (5th Cir. 1994), *en banc rehearing granted*, Nos. 93-1664, 93-1680, 93-8204, 1994 WL 520351 (5th Cir., Sept. 22, 1994); *United Mine Workers of America v. Peabody Coal Company*, ___ F.3d ___, 1994 WL 590188 (6th Cir. 1994).

Both the Chamber and the NAM believe that the federal policies at stake in the WARN Act – and the practical problems state limitations periods would create

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[3] *See, e.g., St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993); *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993); *R.R. Donnelley & Sons Co. v. Prevost*, 111 S. Ct. 1415 (1991).

for WARN litigants – make the NLRA limitations period profoundly more appropriate for actions brought under WARN. On behalf of the large number of their members who are subject to the notice requirement of the WARN Act, the Chamber and the NAM urge this Court to apply the six-month statute of limitations from § 10(b) of the NLRA to WARN actions.

STATEMENT OF THE CASE

The U.S. Court of Appeals for the Third Circuit rejected application of the six-month statute of limitations from § 10(b) of the NLRA in these two consolidated cases. In *North Star Steel Co. v. Thomas,* the appellate court reversed the U.S. District Court for the Middle District of Pennsylvania for dismissing as time-barred a complaint alleging failure to give notice of a plant closing which was filed nearly 20 months after the plant closed. In *Crown Cork & Seal Co. v. United Steelworkers of America,* the appellate court affirmed the U.S. District Court for the Eastern District of Pennsylvania's denial of the company's motion for summary judgment, which argued that an action brought more than twelve months after a plant closing was time-barred.

In reaching this decision, the appellate court acknowledged that "none of the possible state laws provide perfect analogies to WARN," and "that there are some definitional overlaps" between the two federal statutes. Nevertheless, the court held that the policies underlying WARN, and the practicalities of WARN litigation

did not merit an exception to the general rule dictating state borrowing. The Third Circuit, however, declined to specify which of the four Pennsylvania limitations periods should be applied to the instant cases. On January 6, 1995, this Court granted both companies' petitions for writ of *certiorari*.

ARGUMENT

These cases concern a fundamental aspect of federal statutory interpretation: whether the statute of limitations period from § 10(b) of the National Labor Relations Act should be "borrowed" for actions arising under the Worker Adjustment and Retraining Notification Act. The federal courts of appeals have divided on this issue.[4] The Chamber and the NAM urge this court to reaffirm the standard it set forth in *DelCostello v. International Brotherhood of Teamsters, et. al.*, 462 U.S. 151 (1983), which

[4] As noted in the petitions for writ of *certiorari*, the Fifth and Sixth Circuits have applied the six-month limitations period from § 10(b) of the NLRA to actions brought under WARN. *Halkias v. General Dynamics Corp.*, 31 F.3d 224 (5th Cir. 1994), *en banc rehearing granted*, Nos 93-1664, 93-1680, 93-8204, WL 520351 (5th Cir. Sept. 22, 1994); *United Mine Workers of America v. Peabody Coal Company*, 38 F.3d 850 (6th Cir. 1994). On the other hand, the Second and Third Circuits have applied state limitations periods to WARN actions. *United Paperworkers International Union v. Specialty Paperboard, Inc.*, 999 F.2d 51 (2d Cir. 1993); *United Steelworkers of America v. Crown Cork & Seal*, 32 F.3d 53 (3d Cir. 1994), *cert. granted*, 63 U.S.L.W. 3514 (U.S. Jan. 6, 1995).

supports application of a federal limitations period when the federal period provides a "closer analogy" than the state limitations period *and* the practicalities of litigation make the federal rule significantly more appropriate than the state limitations period.

Application of the *DelCostello* framework to the instant case supports adoption of the NLRA limitations period for actions brought under WARN. Since both statutes address essential facets of federal labor law, WARN's policies are best effectuated by application of § 10(b)'s six-month limitations period. Furthermore, the practicalities of WARN litigation, in terms of preventing forum shopping and facilitating the efficient resolution of WARN actions, makes the six-month period vastly more appropriate than a state limitations period.

I. THIS COURT'S RULING IN *DELCOSTELLO v. TEAMSTERS* SUPPORTS APPLICATION OF THE FEDERAL LIMITATIONS PERIOD.

A. The Six-Month Statute of Limitations Period From § 10(b) of the NLRA Provides a "Closer Fit" Than the State Limitations Period.

When Congress fails to provide a statute of limitations for a federal cause of action, courts generally "borrow" or "absorb" the limitation period for the most analogous state cause of action. *Lampf, Pleva, Lipkind, Prupis & Petrigrow v. Gilbertson*, 501 U.S. ___, 115 L. Ed. 2d 321 (1991). This Court, however, has recognized a significant exception to the rule directing "state borrowing." In

DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 172 (1983), the Court held that

> when a rule from elsewhere in federal law clearly provides a **closer analogy** than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, **we have not hesitated to turn away from state law.**

(*emphasis added*). *See also Lampf,* 115 L. Ed. 2d at 331-32 (quoting *DelCostello*).

In *DelCostello,* the Court ruled that an employee's action against an employer for breach of a collective bargaining agreement and against the union for breach of the duty of fair representation was governed by § 10(b)'s six-month limitations period. According to the Court, this type of "hybrid" action was more similar to an action for an unfair labor practice than a breach of contract claim. In reaching this conclusion, the Court made three determinations: (1) that the NLRA provided a closer analogy to the federal claim than the state limitations period; (2) that the federal policies at stake favored application of a uniform, federal statute of limitations; and (3) that the practicalities of litigation favored the application of a uniform federal limitations period. *DelCostello* at 171-72.

Federal limitations periods have been borrowed by this Court using the *DelCostello* framework in a number of circumstances. In *Agency Holding Corporation v. Malley-Duff & Associates,* 483 U.S. 143 (1987), the limitations period from the Clayton Act for civil enforcement actions was borrowed for actions brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO").

Based on the standard set out in *DelCostello*, the Court determined that the Clayton Act – rather than a state cause of action – offered the closest analogy to civil RICO actions.[5] 483 U.S. at 150. Similarly, in *West v. Conrail*, 481 U.S. 35 (1987), the Court applied the limitations period from § 10(b) of the NLRA to actions brought under the Railway Labor Act.

Actions brought under WARN also fall within the category of actions better governed by a federal limitations period. As explained below, the NLRA provides a closer analogy to WARN than do the state-law causes of action urged by the Respondents. Moreover, significant practical difficulties will result for both employers and employees unless the § 10(b) limitations period is adopted.

1. Important Substantive Reasons Exist for Applying the NLRA's Statute of Limitations Period to WARN Cases.

The Chamber and the NAM contend that the six-month statute of limitations from § 10(b) of the NLRA must govern causes of action brought under WARN because both statutes govern fundamental aspects of federal labor policy. As stated in *DelCostello*, courts should not borrow the limitations period applicable to state-law claims when the federal-law cause of action provides a

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[5] The Court in *Agency Holding* added an initial inquiry to the *DelCostello* framework, which asks whether a uniform statute of limitations should be established for the federal cause of action "to avoid intolerable 'uncertainty and time-consuming litigation.' " *Agency Holding* at 150 (quoting *Wilson v. Garcia*, 471 U.S. 261, 272 (1985)).

closer analogy to the cause of action at issue.[6] 462 U.S. at 172. Here, WARN and the NLRA have meaningful substantive similarities that support application of the federal limitations period to WARN actions.[7]

WARN can clearly be analogized to the NLRA. *See e.g., United Mine Workers of America v. Peabody Coal Co.*, 38 F.3d 850, 856 (6th Cir. 1994) ("there can be no doubt that Section 10(b) provides a closer analogy than the state law advocated here, which in essence provides no analogy"). Congress was cognizant that WARN regulated aspects of federal labor policy, and that it would have a dramatic effect on the NLRA.[8] The sponsors of WARN went to

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[6] According to this Court's teachings in *DelCostello*, all that is needed is a "close fit" – not a "perfect fit" – in order to justify favoring a federal limitations period over a state law limitations period.

[7] The Chamber and the NAM contend that the Third Circuit erred in finding that the NLRA is only concerned with the "process" of collective bargaining. The court's distinction between "process" and "substance" ignores the fact that one of the purposes central to the NLRA is the protection of concerted activity by *all* employees, regardless of whether they are represented by a union. 29 U.S.C. § 157. *See also* 1 *Developing Labor Law* 137 (P. Hardin *et al.* eds, 3d ed. 1992) (NLRA "broadly protects 'concerted' activity, not merely union activity").

[8] Congress often recognizes that a new law regulating an aspect of the employer-employee relationship will have an impact on the NLRA. In these situations, Congress either makes a general reference to the NLRA *or* – as in the case of WARN – specifically incorporates definitions from the NLRA itself. *See* Labor Management Reporting and Disclosure Act, 29 U.S.C. § 402(j)(1) (defining a labor organization as "the certified representative of employees under the provisions of the National Labor Relations Act"); Age Discrimination in Employment Act, 29 U.S.C. § 630(e)(1) (adopting the definition

special efforts to guarantee that these two federal labor statutes were compatible. For example, Senator Hatch, ranking minority member of the Senate labor committee, stated that WARN "constitutes a major change in the National Labor Relations Act." 134 Cong. Rec. 15923, 15924 (June 24, 1988). With this concern in mind, Congress specifically incorporated the NLRA into WARN by adding the following provision:

> The giving of notice pursuant to this chapter, if done in good faith compliance with this chapter, shall not constitute a violation of the National Labor Relations Act . . .

29 U.S.C. § 2108.

Moreover, WARN regulations issued by the Department of Labor (20 C.F.R. part 639) expressly incorporate or reference provisions of the NLRA. *See* § 639.1(g) ("Collective bargaining agreements may be used to clarify or amplify the terms and conditions of WARN. . . . "); § 639.3(d) (incorporating the NLRA's definition of "exclusive representative"); § 639.6 (requiring notice be given to exclusive representatives); and § 639.7 (detailing the information that must be provided to the employees' exclusive representative). In addition to the incorporation of these specific terms, the Department has explicitly suggested that courts interpret WARN in accordance with NLRA precedent.[9] 54 Fed. Reg. 106041-42 (April 20, 1989).

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of labor organization from the NLRA); and Civil Rights Act of 1964, 42 U.S.C. § 2000e(e)(1) (incorporating the definition of labor organization from the NLRA).

[9] *See e.g. Carpenters District Council of New Orleans & Vicinity v. Dillard Department Stores, Inc.* 15 F.3d 1275, 1283 (5th

Furthermore, WARN and the NLRA are the only two federal statutes that provide protections to employees who are the subject of mass layoffs or plant closings. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) (setting forth a standard for determining when negotiation over the effects of a plant closing or layoff is a mandatory subject of bargaining under the NLRA); *Dubuque Packing Co., Inc.*, 303 N.L.R.B. No. 66 (1991), *review granted in part, enforcement granted in part, remanded*, 1 F.3d 24 (D.C. Cir. 1993), *cert. dismissed*, 114 S. Ct. 2157 (1994) (affirming the NLRB's new standard for determining when an employer must bargain with a union over the effects of a plant closing or layoff). As the Fifth Circuit aptly observed, "[t]he NLRA is more than just analogous to WARN; in fact, WARN may be thought of as an outgrowth of the NLRA, because § 8(a)(1) and 8(a)(5) of the NLRA . . . have [both] been interpreted to require an employer to notify a union of its decision to close a plant." *Halkias v. General Dynamics Corp.*, 31 F.3d 224 (5th Cir. 1994), *en banc rehearing granted*, Nos. 93-1664, 93-1680, 93-8204 WL 520351 (5th Cir., Sept. 22, 1994) at 232.

By contrast, WARN has no relationship to the state common law limitations periods. In the instant case, the

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Cir. 1994), *cert.* denied, 63 U.S.L.W. 3559, 3562 (Jan 23, 1995) (citing National Labor Relations Board principles regarding back pay); *Damron v. Rob Fork Mining Corp.*, 945 F.2d 121, 124 (6th Cir. 1991) (analyzing WARN's "reasonable expectation of recall" language according to NLRB guidelines); and *Bradley v. Sequoyah Fuels Corp.*, 847 F.Supp 863, 868 (E.D. Okla. 1994) (applying NLRB guidelines regarding "temporary layoff" and "reasonable expectation of recall" to WARN actions).

Third Circuit sanctioned the use of four alternative Pennsylvania limitations periods, each of which bears no relation to federal labor relations or plant closings. Clearly, the Third Circuit was incorrect in holding that state law provides a closer substantive similarity to WARN.

2. Important Practical Reasons Exist for Applying the § 10(b) Limitations Period to WARN Actions.

The six-month period contained in § 10(b) of the NLRA must be "borrowed" for actions brought under the WARN to avoid creating practical problems for WARN litigants. The purpose of WARN is to provide uniform federal regulation of plant closings and mass layoffs. Unless a uniform federal statute of limitations is applied in WARN actions, this purpose will be completely undermined.

Application of state limitations periods to WARN actions will significantly increase forum shopping by potential plaintiffs, and will serve to complicate all aspects of WARN litigation. WARN contains a broad venue provision allowing suit in, among other places, any district in which the employer **transacts business**. 29 U.S.C. § 2904(a)(5). The practical consequence of combining this expansive venue provision with widely divergent state statutes of limitation **would be to drive WARN suits into jurisdictions having little or no rational connection to the parties or to the WARN events**. Jurisdictions – in which the only connection between the court and the suit is that the employer transacted business in that venue – would become vehicles for litigating claims

time-barred by the state in which the WARN events occurred and the parties reside.

The effort to cure a default in one state by shopping for a longer statute of limitations in another would breed expensive and complex battles over choice of law questions. *See Peabody Coal,* 38 F.3d at 855 (describing the choice of law problems as "potentially daunting"). A court district sitting in a jurisdiction other than where the WARN claim arose first would have to determine whether or not it should adopt the forum state's choice of law principles as surrogate for federal common law. *See Halkias,* 31 F.3d at 236-37 (noting that choice of law principles in federal question cases are derived from federal common law). Once the court decides to do so, it must then determine whether the forum state views statutes of limitations as substantive or procedural. *See id.* If the forum views limitations periods as procedural, only then would the court proceed to determine the merits of the WARN issue, using the forum state's limitations period. All these determinations would likely cause time-consuming litigation, thereby wasting substantial amounts of judicial resources and running up unnecessary attorney's fees for all parties.

The delay and costs inherent in permitting parties to file suit in states that have no relationship to the dispute other than a longer limitations period would be particularly destructive to WARN. Circumstances in which plants are closed and workers are laid off in mass are not reasonably addressed in litigation years after the fact. Small businesses, in particular, would be severely impacted by delay in litigating WARN suits. As a practical matter, small businesses do not have the resources to

maintain personnel records for any length of time. Key witnesses are likely to be unavailable at the time a WARN action ensues. In fact, WARN typically applies to a small business only during its closing. It is unreasonable to assume that a WARN claim in that context – one asserted against a business that no longer exists after its plant is closed – can be maintained years after the fact.

Additionally, allowing parties to "forum shop" will have a detrimental impact on the judiciary. As in the instant case, plaintiffs in WARN actions will advocate adoption of the most advantageous state limitations period, and the courts will be forced to litigate the limitations dispute before reaching the merits of the WARN dispute. This not only wastes critical judicial resources, but also delays compensation to plaintiffs for what may later be judged to be a meritorious WARN claim. Katherine F. Nelson, *The 1990 Federal "Fallback" Statute of Limitations: Limitations By Default*, 72 Neb. L. Rev. 454, 473 (1993).[10]

Borrowing state limitations periods will only further complicate complex multi-state litigation. The DOL's regulations expressly recognize that WARN claims may involve multiple sites under common ownership or control.[11] For a Chamber or NAM member, a "downsizing"

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[10] This case illustrates the problem lack of uniformity creates. Both North Star Steel Company and Crown Cork & Seal initiated their plant closings in 1991. Approximately four years later, the merits of these claims have not been reached because of litigation over the limitations issue.

[11] The regulations point to the case of a "major automaker which has dozens of automobile plants throughout the country." 20 C.F.R. § 639.3(a)(4).

may involve closing individual divisions located in several states. In such cases involving multiple claims, "[t]rying to determine what state time-bars apply further complicates an already complex action and may impair settlement negotiations." *Id.* at 474. Adoption of the NLRA's uniform limitations period would alleviate these concerns.

Since WARN emphasizes the speedy resolution of disputes, the six-month limitations period from § 10(b) is by far more appropriate than any state limitations period of greater length. The assumption that WARN's enforcement will be fostered by lengthy state limitations periods is simply misconceived. The purpose of WARN is to provide advance notice of imminent unemployment so that employees can pursue other employment options. To further this purpose, Congress limited the remedies for a WARN violation to the sixty days' pay the employee would have received had the proper notice been given. The variety of compensatory and punitive remedies that prompt individuals to sue years after a plant closes are just not available in WARN actions. Thus, the six-month limitations period is consistent with Congress' intent to provide quick resolution of WARN disputes.[12]

Finally, the six-month limitations period from § 10(b) provides an effective balance between an employee's need to commence legal actions and an employer's need

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[12] Consistent with this emphasis on efficient resolution of WARN disputes, Congress does not impose civil sanctions on employers who make complete payments within three weeks of the WARN event to employees affected by a plant closing or layoff. 29 U.S.C. § 2104(a)(4).

to know its contingent liabilities in planning for the future. The relatively short limitations period has worked effectively under the NLRA for approximately forty years. In addition, short limitations periods have been adopted by Congress in a number of other federal labor statutes. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e) ("A charge under this section shall be filed within 180 days after the alleged unlawful employment practice . . . "); and Civil Service Reform Act of 1978, 5 U.S.C. § 7118(a)(4)(A) (" . . . no complaint shall be issued based on any alleged unfair labor practice which occurred more that 6 months before . . . "). Thus, application of the six-month period from § 10(b) would be consistent with Congress' past actions in the employment area.

CONCLUSION

For the foregoing reasons, the Chamber and the NAM urge the Court to apply the six-month statute of limitations from § 10(b) of the NLRA to actions brought under WARN.

Respectfully submitted,

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